

Supreme Court, U. S.

F I L E D

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

76-892

GEORGE M. FLOREA and
RAYMOND PAUL VARA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Petitioners, GEORGE M. FLOREA and RAYMOND PAUL VARA, respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 30, 1976.

OPINION BELOW

The opinion below was rendered on August 30, 1976, by the United States Court of Appeals for the Sixth Circuit. A copy of the opinion is attached hereto as Appendix "A".

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether the Court erred in communicating to the jury through his Deputy Clerk, and allowing a chief prosecution witness, a Special Agent of the F.B.I., to play tapes for the jury during their deliberations without notice to the Defendants or their attorneys, and whether this error requires reversal.

STATUTES INVOLVED

Federal Rules of Criminal Procedure, Rule 43, provides in pertinent part:

Presence of the Defendant

- (a) The defendant shall be present... at every stage of the trial, including the impanciling of the jury and the return of the verdict... except as otherwise provided by this Rule.

Federal Rules of Criminal Procedure, Rule 52, provides:

Harmless Error and Plain Error

- (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
- (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF THE CASE

Petitioners herein were indicted by a federal grand jury sitting in the Northern District of Ohio. The indictment charged Petitioners with violating Title 18, United States Code, Section 1084, transmitting of wagering information across state lines, and Title 18, United States Code, Section 371, conspiracy. Ultimately, the conspiracy charge was dismissed, and the Petitioners were found guilty of the substantive offenses.

During the morning of August 28, 1974, while the jury was deliberating this case, it attempted to communicate to the Court to request to hear certain tapes which had been admitted as evidence during the course of the trial. The Deputy Clerk, pursuant to instructions given to him by the Court earlier on the morning of August 28, brought the jury back into the courtroom and gave them certain instructions. F.B.I. Special Agent Ault, one of the chief witnesses for the prosecution, was called in to run the recorder and play the tapes which the jury had requested to hear. The Court saw no need to advise counsel for the defendants of the request of the jury to replay the tapes, or of the procedures which would be used in acceding to the jury's request. It should be noted that throughout the course of the trial, the Judge had referred to Agent Ault as the "Court's technician", and Agent Ault had operated the tape player during the trial. On August 28, 1974, after the jury had announced that they had reached a verdict, but before it had been given in open court, the Petitioners learned that the tapes had been replayed. The Petitioners immediately moved for a mistrial on the ground that they had not been present during "a stage of the trial". The trial Court overruled the motion at that time.

On September 20, 1974, the date of sentencing, a special hearing was held to determine what had transpired on August 28, 1974, while the tapes were replayed. The Court specifically found that the tapes had been replayed pursuant to the instructions of the Court in a locked courtroom after everyone had been excluded therefrom except Agent Ault, a Deputy Clerk, and obviously, the jury.

It is respectfully submitted that it is impossible for the defendants to know whether the Deputy Clerk correctly instructed the jury, and additionally, to know the extent of the full communication he had with the jury. It is apparent that the replaying of certain portions of the tapes outside the presence of the defendants must have had some bearing on the jury's verdict, and additionally, that the playing of the tapes themselves must have been deemed important to the jury or they would not have requested that they be replayed. Under the circumstances, the defendants should have been present and should have been entitled to have been seen by the jury, and the jury in turn should have had a right to view their demeanor, especially here where the jury had expressed a particular interest in certain portions of the trial testimony relevant to the defendants. It is impossible to measure the psychological effect on the jury of the presence of Special Agent Ault and the absence of the defendants at the time of the replaying of the tapes.

REASON FOR GRANTING THE WRIT

I.

THE COURT ERRED IN COMMUNICATING TO THE JURY THROUGH HIS DEPUTY CLERK, AND IN ALLOWING A CHIEF PROSECUTION WITNESS, A SPECIAL AGENT OF THE F.B.I., TO PLAY TAPES FOR THE JURY DURING THEIR DELIBERATIONS WITHOUT NOTICE TO THE DEFENDANTS OR THEIR ATTORNEYS, AND WITHOUT THE DEFENDANTS HAVING BEEN PRESENT, AND SUCH ACTION REQUIRES REVERSAL.

In the case at bar, the Sixth Circuit Court of Appeals specifically held, in pertinent part:

"We hold that without prior stipulation, a trial court should not permit any unauthorized person — especially one associated with either prosecution or defense — to communicate with or otherwise have any contact with a jury in any proceeding. If such contact is necessary, it should be under the personal supervision of the court. We determine that a per se rule is necessary here because although the danger of improper influence inheres in every contact between an interested party and a jury, actual prejudice may be difficult to establish."

The Court further held that,

"Although we do not hold that the contact with the jury in this case violated due process . . . we nonetheless do not — and in the future we will not — condone similar acts. . . ."

In effect, while the Sixth Circuit recognized that error had occurred in the case at bar, and additionally

gave notice through their opinion that in the future, this would be error per se, they did not find it necessary to hold that law applicable to the case at bar, and further did not reverse or remand the case.

In the case of *United States v. Pittman*, 449 F.2d 1284 (9th Cir. 1971), the Ninth Circuit dealt with this particular issue. In that case, the Court of Appeals held that it was reversible error for the Court, without knowledge or consent of a defendant or his counsel, to direct a government agent who had played tape recordings during the course of a trial and who had been prominently aligned with the government's case, to accompany a clerk into a jury room to replay tapes after the jury had notified the trial court that they wished to again listen to tape recordings. In the *Pittman* case, the Ninth Circuit specifically reversed because "the privacy of the jury room was improperly invaded by an agent of the prosecution." The Court held that access to the jury during its deliberative process by any adversary simply could not be tolerated, particularly in light of *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424 (1965). There, as in the case at bar, the Court recognized that the impact upon the jury of such a situation could not accurately be measured, or even ascertained.

It is apparent from a review of the case at bar, and the *Pittman* case, that a conflict now exists between the circuits in regard to the procedure which is to be followed when an individual aligned with the prosecution assists the jury outside of the presence of the defendant, and without the knowledge of the defense attorneys. The Ninth Circuit found it to be error, and reversed and remanded the case in which the issue had first been raised. The Sixth Circuit, on the other hand, found it to be error, but refused to reverse the case in which the issue was raised, and only decided to apply it

prospectively. It is further respectfully submitted that the action of the Sixth Circuit is violative of the rationale of *Rogers v. United States*, 422 U.S. 34 (1975), which required the presence of the defendant and his counsel when a deliberating jury requests an opportunity to review evidence, and that request requires the communication of third persons with the jury.

Petitioners herein contend that review by this Court is presently necessary to resolve the conflict among the circuits, and additionally is necessary in light of *Rogers, supra*.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was, on the 28~~st~~ day of December, 1976, mailed, postage prepaid, to the Honorable ROBERT BORK, Solicitor General, United States Department of Justice, Washington, D.C. 20534.

C.L.B. PUBLISHERS

**No. 75-1613
No. 75-1614**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE M. FLOREA and
RAYMOND PAUL VARA,

Defendants-Appellants.

ON APPEAL from the
United States District
Court for the North-
ern District of Ohio.

Decided and Filed August 30, 1976.

Before: WEICK, CELEBREZZE, and McCREE, Circuit Judges.

McCREE, Circuit Judge. Raymond P. Vara and George M. Florea appeal from a jury conviction of three counts of transmitting wagering information across state lines in violation of 18 U.S.C. § 1084.¹ Count I of the indictment, charging conspiracy to transmit wagering information, was dismissed on the government's motion after the first trial ended in a

¹ In relevant part, 18 U.S.C. § 1084 provides that

[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

mistrial because the jury was unable to reach a verdict. Counts II, III, and IV, charging the substantive offenses, refer to three telephone calls that were monitored pursuant to court-ordered interception.

A number and variety of issues are presented on appeal.² Appellants contend first that the district court erred in permitting two communications to be made to the jury in the absence of appellants or their counsel. Second, appellants contend that the district court erred in denying their motion to suppress the tapes of the intercepted conversations. Finally, appellants argue that the evidence was insufficient to support their convictions. We conclude that no reversible error was committed and affirm.

I. COMMUNICATIONS WITH THE JURY IN APPELLANTS' ABSENCE.

The first communication of which appellants complain concerns the participation of an FBI agent who was present when tapes admitted as evidence were replayed for the jury after it commenced its deliberations. The other occurred when a juror told the judge of an attempt to influence his verdict. Appellants contend that because F. R. Crim. P. 43 provides that a criminal defendant is entitled to "be present . . . at every stage of the trial," they were entitled to be present in both cases. They claim that because they were not present they did not receive a fair trial. We disagree.

The first issue we consider is whether the district court erred in allowing, without notice to appellants or counsel, a prosecution witness to replay tape recordings of the intercepted conversations for the jury during its deliberations. After the jury commenced deliberations, it notified the court that it

² We observe that although all issues were briefed jointly on appeal by Vara and Florea, in the trial court, certain issues were raised only by Vara. We find it unnecessary to consider whether Florea may raise these issues for the first time on appeal, because they do not involve reversible error.

wanted to hear again certain tapes that had been admitted as evidence. Pursuant to the court's instructions and without notification of counsel, the courtroom deputy clerk brought the jurors into the locked courtroom where Special Agent Ault replayed the tapes. The judge had referred to Ault as the "court's technician,"³ and Ault had operated the tape recorder during the trial.

On August 28, 1974, after the jury announced that a verdict had been reached, but before it had been given to the court, appellants learned that the tapes had been replayed. They immediately moved for a mistrial on the ground that this event occurred during a "stage of the trial" at which they were entitled to be present, as provided in Rule 43. Appellants vehemently objected to the participation of Agent Ault who had been a witness for the prosecution.

The judge overruled the motion at that time, and then on the day of sentencing, September 20, 1974, he indicated that a record should be made to reflect in more detail what transpired. Accordingly, the courtroom deputy clerk, Special Agent Ault, and a law clerk who had knowledge of the proceedings were called as witnesses to testify about what happened after the jury's request to rehear the tapes. The witnesses testified out of the presence of each other, and there was no conflict in their testimony. After the court and all counsel had an opportunity to question the witnesses, the court summarized the procedure as follows:

The tapes were replayed pursuant to the instructions of the Court in a locked courtroom after everyone had been excluded therefrom except the technician [Ault] and the Deputy Clerk. . . . [The Deputy Clerk then advised the jury] that there was to be no conversation with the exception of a request to play any entire specific tape or a

³ Additionally, we question the propriety of the trial court's reference to Ault, a prosecution witness and government agent, as the "court's technician" in charge of the recording equipment during the course of the trial.

portion thereof, that no notes were to be taken, and there was to be no conversations [sic] with any of the individuals present.

Although Rule 43 does not entitle a defendant to be present during the jury's deliberations (which are not "a stage of the trial" at which he is entitled to be present), arguably he may be entitled to be present when a jury returns to the courtroom to rehear evidence, just as the defendant's presence is required when a jury receives additional instructions after it begins deliberations. The Supreme Court recently held that Rule 43 requires a trial judge to answer jury questions in open court, and to afford counsel an opportunity to be heard before the court's response. *Rogers v. United States*, 422 U.S. 35 (1975). The rationale of *Rogers* would also seem to require the presence of the defendant and counsel when a deliberating jury requests a reprise of evidence that requires the communication of third persons with the jury. In this case, however, we need not formulate a general rule because we have the practical equivalent of a stipulation by counsel that the court could permit the tapes to be replayed before the jury in counsel's absence.

An examination of the transcript reveals that in part of his instructions, the judge informed the jurors that all exhibits were available for their consideration and assistance during deliberations. Thus, at that time, defense counsel knew that the tapes, Exhibits 19, 20, 21, 22, and 73, would be available to the jury, and made no objection. Furthermore, when counsel for appellants finally did object, their primary objection was directed at the presence of Agent Ault, because of his "interest in the outcome of this lawsuit." Appellants have not demonstrated to us any prejudice that resulted from the judge's failure to answer the request in open court. We do not readily infer a waiver of a defendant's right to be present in court. However, under these circumstances, we determine that appellants constructively stipulated to the replay of the tapes at the jury's request.

Although we have found no violation of Rule 43, we must still decide whether the presence of Agent Ault during the jury deliberations requires reversal. First, we conclude that there was no violation of due process. Second, although a district court should not permit anyone other than authorized court personnel to communicate with a jury during its deliberations, nevertheless we conclude that in this case reversal is not required under our supervisory authority, because Ault's presence did not affect appellants' "substantial rights." Rule 52(a), F. R. Crim. P.

On at least one occasion, the Supreme Court has held that unauthorized contact with a jury violates due process. In *Turner v. Louisiana*, 379 U.S. 466 (1965), two deputy sheriffs who were prosecution witnesses were placed in charge of a jury which had been sequestered. The Court reversed Turner's conviction because it determined that the association between the witnesses and the jury deprived Turner of the right to trial by an impartial jury. 379 U.S. 471.

Clearly a jury must be protected against unauthorized communication, but the Court in *Turner* did not adopt a *per se* rule that any contact between a witness for the prosecution and a jury requires reversal of a conviction. See *Helmick v. Cupp*, 437 F.2d 321 (9th Cir. 1971), cert. denied, 404 U.S. 835 (1971). Furthermore, *Turner* is distinguishable from this appeal. In *Turner*, the jury contact was continuous and intimate association with a sequestered jury on three consecutive days, which provided an opportunity for the prosecution witnesses "to renew old friendships and make new acquaintances among the members of the jury." 379 U.S. at 473. Here, in contrast, Agent Ault was never alone with the jury and was in its presence only long enough to replay the tapes.

The opinion in *Turner* discloses that the deputies who had testified for the prosecution and were in charge of the jurors were "the two principal witnesses for the prosecution." 379 U.S. at 467. Their testimony established that one of them had conducted the investigation leading to Turner's arrest,

and the other had "prevailed upon Turner to make a written confession." And they were the officers who arrested Turner and accompanied him to the location where part of the murder weapon was located. 379 U.S. at 467. Agent Ault, on the other hand, was but one of sixteen witnesses for the government, and he testified only to the fact that appellants' telephone conversations had been intercepted and that their residences had been searched. After a review of all the evidence, we conclude that appellants were not deprived of a fair trial.

Although we do not hold that the contact with the jury in this case violated due process as it did in *Turner*, we nonetheless do not — and in the future we will not — condone similar acts. We are required to exercise supervisory authority over the administration of justice in courts of this circuit even in cases where departures from ideal procedures fall short of a violation of due process. See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). Therefore, we hold that without prior stipulation a trial court should not permit any unauthorized person — especially one associated with either prosecution or defense — to communicate with or otherwise have any contact with a jury in any proceeding. If such contact is necessary, it should be under the personal supervision of the court. We determine that a *per se* rule is necessary here because although the danger of improper influence inheres in every contact between an interested party and a jury, actual prejudice may be difficult to establish.⁴

Appellants also contend that the district court erred in excusing a juror, *sua sponte*, without notice to them or to their counsel, and without either an explanation of the reasons for the action or an opportunity to object.

⁴ *Per se* rules frequently are fashioned when there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish; or when an important social policy will be served by a prophylactic rule; or a more definite standard is required to guide official conduct in future cases; or when case by case analysis places an unjustifiable burden on limited judicial resources. *Dawson v. Cowan*, 531 F.2d 1374 (6th Cir. 1976).

The district court gave the following account of this incident in a sealed transcript which was then transmitted to the court of appeals. On Monday, August 26, 1974, the jury was expected to begin deliberating. Before court commenced that morning, the judge was approached in chambers by Juror Number One, who stated that on the previous weekend he had received \$200 in an envelope and a telephone call from a person who told him that he would also be further "rewarded later." The judge summoned a court reporter to transcribe the juror's statement, as well as the judge's decision to (1) excuse Juror Number One and to replace him with an alternate juror; (2) immediately sequester the jury; (3) not disclose to the parties the reason for the discharge; and (4) direct the FBI to undertake a full investigation.⁵

Appellants rely on *United States v. Gay*, 522 F.2d 429 (6th Cir. 1975), in which we held that it was reversible error for the trial judge to engage in discussions with members of the jury and to consider requests for excuses out of the presence of the defendant and without notice to counsel. In *Gay* the jury had been selected and sworn nine days before the commencement of the trial. During the intervening period between the jury selection and the trial, the district judge had determined that the jury should be sequestered for the length of the trial. Without informing the defendant or his counsel, the judge had excused two regular jurors and one alternate, and had replaced the two regulars with other alternates. The defendant argued that the court erred in conversing in defendant's absence with the jurors after they had been impaneled, and that the defendant should have been afforded the opportunity to object to requests for excuses from jurors and to have a record made of the proceedings.

In *Gay* the total absence of a record of the proceedings in which changes in the jury occurred required us to assume

⁵ The trial judge ordered the investigation because there were strong indications that the first mistrial, when the jury was unable to reach a verdict, may have involved jury tampering.

prejudice. Based on the defendant's right to be present "at every stage of the trial," Rule 43, F. R. Crim. P., we reversed the conviction and remanded for a new trial. However, we specifically stated that our holding "does not affect the discretion of the trial court to dismiss a juror and replace him with an alternate, or dismiss an alternate for illness, hardship or other cause." 522 F.2d at 435. We further observed that "even though such dismissals are within the discretion of the trial judge and do not require consent of the parties, his discretion is always subject to review for abuse, and a record is necessary for such review." 522 F.2d at 435.

In the present case, the trial judge carefully prepared a record of the proceedings. The record included the testimony of the juror, and the court's reasons for excusing him. Under the circumstances, the district judge did not exceed the bounds of judicial discretion discussed in *Gay*. Accordingly, we conclude that under the circumstances of this case, appellants were not prejudiced because they were absent when the district judge excused Juror Number One, substituted an alternate, and sequestered the jury.

II. WIRE INTERCEPTION APPLICATION AND ORDER.

We turn next to appellants' contention that the government failed to comply with statutory requirements for the application and issuance of the intercept order, 18 U.S.C. §§ 2510-2520, and that the district court erred in refusing to suppress the tapes of the intercepted telephone conversations.

A large part of the government's evidence was gathered pursuant to an order issued by the district court on November 28, 1972, authorizing the interception of wire communications. The government's application contained, *inter alia*, a forty-six page affidavit submitted by an FBI special agent. The affidavit asserted that reliable informants stated that appellants and others engaged in illegal gambling activities, and that this information had been corroborated by physical surveillance

and by records of the telephone company. The district court granted the government's application and authorized the FBI to intercept wire communications of Vara, Florea, and five other named persons allegedly involved in the gambling offenses.

18 U.S.C. § 2516(1)⁶ establishes a procedure for applications to intercept wire communications. It requires that before a federal judge may grant an order authorizing the interception an application must be authorized by the Attorney General or by a specially designated Assistant Attorney General. In an order dated November 8, 1972,⁷ Attorney General Richard Kleindienst specially designated Assistant Attorney General Henry Peterson to authorize applications for interception orders from November 12, 1972, through November 26, 1972. On November 22, 1972, Assistant Attorney General Peterson authorized the applications for the wiretaps challenged here.

⁶ In pertinent part, 18 U.S.C. § 2516(1) states that

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made

⁷ Order No. 495-72:

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, the Assistant Attorney General in charge of the Criminal Division is specially designated to exercise the authority conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code.

The authority delegated herein to the Assistant Attorney General in charge of the Criminal Division shall be exercised by him only during my absence in Europe from November 12, 1972, to November 26, 1972, inclusive, and shall expire at the end of the latter day.

November 8, 1972

/s/ Richard G. Kleindienst
Attorney General

Pursuant to this authorization, an application was presented to the district judge on November 28, 1972.

Appellants claim that since the authority of the Assistant Attorney General expired on November 26, his authorization was no longer valid when it was presented to the district judge on November 28. We find no merit in appellants' claim, since § 2516(1) requires that the Assistant Attorney General be specially designated when he authorizes the application, and not when the application is presented to the court. Appellants concede the authority of the Assistant Attorney General on November 22, when the application was originally approved. Our conclusion is consistent with the legislative history of section 2516(1), which indicates that the reason for requiring the approval of *only* the Attorney General or a specially designated Assistant Attorney General was to assure uniform practices in authorizing applications for electronic surveillance. 1968 U.S. Code Cong. & Adm. News 2112, 2185.

Appellants' reliance upon *United States v. Giordano*, 416 U.S. 505 (1974), is misplaced. *Giordano* holds that § 2516(1) must be strictly construed only to permit the Attorney General or a specially designated Assistant Attorney General to exercise the authority to approve an interception application. Our decision is consistent with *Giordano*, since Peterson was specially designated when he authorized the interception application.

Appellants' next contention is that the district court erred in quashing a subpoena issued by Vara to Attorney General Richard Kleindienst. According to appellants' brief, Mr. Kleindienst was subpoenaed "to testify as to what he intended at the time he issued Order 495-72."⁸

The Supreme Court recently stated in *United States v. Nixon*, 418 U.S. 683, 702 (1974):

Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the

trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17 (c). [F. R. Crim. P.]

We conclude that the trial court did not abuse its discretion by quashing the subpoena. The district court in its order denying appellants' motion to suppress evidence recited "that all material facts necessary for a ruling [on the motion to suppress] are before the Court. The appearance of Richard Kleindienst . . . has not been shown to be required." This conclusion is amply supported by the evidence presented to the trial court.

Vara and Florea also argue that the district court should have suppressed the tapes of the intercepted telephone communications, because the affidavit in support of the wiretap application was submitted unsigned. Appellants contend that this procedure violated 18 U.S.C. § 2518(1), which provides that

[e]ach application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

On November 28, 1972, Steven Olah, an attorney for the Department of Justice, and Richard Ault, Jr., a special agent of the FBI, appeared before Judge Battisti to apply for the order authorizing interception of certain wire communications. Although Agent Ault failed to sign the affidavit in support of the application for the intercept order, it is undisputed that prior to the entry of the intercept order, in the presence of the district judge, Ault swore to the truth of the contents of the affidavit. Moreover, the affidavit was enclosed as a part of

⁸ Order No. 495-72 is set out in full in note 7, *supra*.

the actual application which did contain the signature of Mr. Olah.

18 U.S.C. § 2518 does not require submission of affidavits; it merely requires that written applications be submitted upon oath or affirmation. Consequently, we find that there was compliance with section 2518(1), since Judge Battisti based the order on the sworn statements made in his presence as well as the written application.

Appellants' next assignment of error is that 18 U.S.C. § 2518 (8)(b) was violated. This section requires that

[a]pplications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

In August of 1973, Edwin Gale, an attorney for the Department of Justice, was requested by his superiors to submit to them copies of the signature pages from the wire interception authorizations of November 28 and December 26, 1972, and from the moving papers that accompanied those authorizations.

On August 28, 1973, a district judge signed an order authorizing Gale to unseal, copy, and return the papers. After obtaining the specified, sealed documents, Gale took them to the copying room, broke the seals, made the copies, and then returned the originals to the court.

Appellants contend that this procedure violated the sealing requirements of § 2518(8)(b). Since that section permits disclosure after sealing "upon a showing of good cause before a judge of competent jurisdiction," appellants' argument that the seal should never be broken is without merit. Moreover, we are convinced that the request to make the copies of the sealed documents did contain the requisite showing of good cause, and appellants have offered no persuasive suggestions

to the contrary. Our conclusion is consistent with the legislative history of § 2518(8)(b), which indicates that the sealing requirements were established in order to protect the confidentiality of the government's investigation as well as the authenticity of the application and order. 1968 U.S. Code Cong. & Adm. News 2112, 2194.

Appellant Vara also asserts that the government did not strictly comply with 18 U.S.C. § 2518(1)(e)⁹ because it failed to incorporate a complete statement of all the facts concerning all previous wire interceptions involving Vara. It is undisputed that two applications to intercept wire communications had been authorized on October 14, 1972, by the United States District Court of Nevada. Although the wiretaps conducted pursuant to the Nevada authorization intercepted communications in which Vara participated, an in-camera inspection of the moving papers for the two applications disclosed that neither Vara, his residence, nor his phone numbers were listed in the application or in the order. The district court specifically found that Vara's name, identity, and activities became known to the government agents only during the course of the interceptions authorized by the Nevada court. The language of § 2518(1)(e) does not require disclosure of information about prior *interceptions*, but only of information about prior *applications*. See *United States v. Bellosi*, 501 F.2d 833, 839 (D.C. Cir. 1974).

⁹ 18 U.S.C. § 2518(1) requires:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.

Moreover, Vara's claim is controlled by our decision in *United States v. O'Neill*, 497 F.2d 1020 (6th Cir. 1974). The appellants in *O'Neill* asserted that the application to intercept their communications did not contain information about other communications of theirs that had been intercepted by means of an earlier state authorized wiretap. Just as the Nevada wiretap application did not name Vara, so the state authorization in *O'Neill* did not name O'Neill and his co-defendants. In *O'Neill*, 497 F.2d at 1026, we held:

Since the application [for interception] disclosed the only previous authorizations known to the applicants and to the Acting Attorney General who authorized the application, there was complete compliance with the statute. [18 U.S.C. § 2518(1)(e)].

We also stated that even if the applicants for the federal wiretaps had known that O'Neill's conversations had previously been intercepted pursuant to the state authorization, § 2518 (1)(e) would not require this disclosure unless O'Neill or his residence had been designated in the state application and order. Since neither Vara nor his residence was designated in the Nevada wiretap application or order, we determine that there was no violation of the statute.

III. SUFFICIENCY OF EVIDENCE.

Finally, appellants attack the sufficiency of the evidence that led to their convictions. In determining whether there is sufficient evidence to support a jury's verdict, the evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976). We are firmly convinced that the evidence presented in the court below was sufficient to support appellants' conviction of violating 18 U.S.C. § 1084. There is substantial evidence included in the record from which a jury could find (1) that appellants were engaged in the

business of betting or wagering; (2) that the telephone conversations in question were made across state lines; and (3) that in each call, information assisting in the placing of bets was transmitted.

We conclude that appellants received a fair jury trial, that the government complied with the statutory requirements for the application and issuance of the wire intercept order, and that the jury's verdict was supported by sufficient evidence. Accordingly, the judgments of conviction are AFFIRMED.

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

No. 76-892

In the Supreme Court of the United States
OCTOBER TERM, 1976

GEORGE M. FLOREA and
RAYMOND PAUL VARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 541 F. 2d 568.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1976. A petition for rehearing was denied on October 29, 1976. On November 26, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including December 28, 1976, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether reversal of petitioners' convictions is required because a government agent operated the machine upon

which tape recordings previously admitted in evidence were replayed to the jury, pursuant to its request during deliberations.

STATEMENT

Following a second jury trial¹ in the United States District Court for the Northern District of Ohio, petitioners were convicted of three counts of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. Each was sentenced to a year's imprisonment, to be followed by five years' probation, and a fine of \$10,000. The court of appeals unanimously affirmed (Pet. App.).

The evidence included tapes of three telephone conversations, intercepted under a court order, in which petitioners compared information used to establish the point-spread or "line" on numerous basketball and football games. Each of the three conversations took place between Florea, in Ohio, and Vara in Las Vegas, Nevada. Each conversation was charged as a separate count.

In the first conversation, at about 11:20 a.m. on December 4, 1972, petitioners discussed, in addition to line information (Tr. 642), a wager from an individual who "can't come in to us direct" (Tr. 641). They also discussed a loan to a third person at a rate of interest common in gambling circles (Tr. 642). The second call, made approximately an hour and a half later, "continue[d] the conversation about the loan account." In addition, Vara told Florea "Mississippi State is a good bet, it is not on the board." Florea also reviewed his line information with Vara (Tr. 644). In the third call, made three days later,

petitioners compared lines with total scores and discussed making wagers on various teams using different lines (Tr. 645-646).

The government's expert on gambling, FBI Agent Ted Whitcomb, testified that the evidence showed petitioners were engaged in a "continuous, ongoing business relationship involved with predominantly sports wagering" (Tr. 646). He also testified that the line information exchanged in the telephone calls was "indispensable" for bookmaking operations (Tr. 646; see Tr. 578-581).

The jury began its deliberations on August 27, 1974. The next morning, it notified Deputy Clerk Jonathan Soucek that it wished to have the taped conversations replayed.² Acting on instructions given him by the trial judge earlier that morning, Soucek brought the jury into the courtroom and allowed the jury to hear the tapes. The recorder was operated by FBI Agent Richard Ault, who had operated it during the trial (Tr. p. 4-6, 12-13).² Acting under the court's instructions, Ault said nothing to the jury. In fact, he sat with his back to the jury and spoke only to Deputy Clerk Soucek, and then only once, to inform Soucek that a certain tape would be played from the beginning (Tr. p. 11-14).

After a special hearing to consider petitioners' claims that this procedure had denied them a fair trial, the trial judge found (Tr. p. 17-18):

The tapes were replayed pursuant to the instructions of the Court in a locked courtroom after everyone had been excluded therefrom except the technician and the Deputy Clerk. The jury was not returned to the locked courtroom from their deliberation room

¹Petitioners' first trial ended in a mistrial when the jury failed to reach a verdict.

²"Tr. p." refers to the transcript of the special hearing held on September 20, 1974.

until such time as Special Agent Ault had prepared at least the first tape for the replay and had assorted the remaining tapes in an orderly manner for replay.

Thereafter, the jury was ushered into the locked courtroom, and the Deputy Clerk, pursuant to the Court's instructions, advised and directed the conduct of all individuals that were present in the courtroom during replaying of the said tapes; namely, that there was to be no conversation with the exception of a request to play any entire specific tape or a portion thereof, that no notes were to be taken, and there was to be no conversations with any of the individuals present.

Thereafter, the tapes were replayed pursuant to the instructions of the Court as transmitted by the Deputy Clerk.

The district court also pointed out (Tr. p. 16-19):

The tapes, unlike the other exhibits, were of no value to the jury unless they were able to have those tapes replayed for them [if desired] * * * during the deliberations * * *.

Unfortunately, the only method available to accommodate the jury was to replay the tapes with the use of a rather complicated transcribing mechanism which required the technical knowledge of an operator or a technician.

* * * * *

[T]he tapes were [already] * * * constructively in the possession of the jury * * *.

* * * * *

[Replaying the tapes] was merely an extension of the jury's deliberation within the privacy of the jury deliberation room impacted only by the necessity of the use of a technical piece of equipment which required the assistance of a technician for its operation. That technician was Special Agent Ault. He had been the technician throughout the entire trial, and he continued in that capacity during the extension of the jury's deliberation when [the jury] requested the replay of the tapes.

ARGUMENT

Petitioners contend that they were denied a fair trial when the court allowed Soucek to respond to the jury's request to hear the tapes, without notice to them and in their absence, and in allowing Agent Ault, who had been a government witness,³ to play the tapes. These claims do not warrant plenary review by this Court.

1. It is of course true that a defendant has the right to be present at every stage of trial. Rule 43, Fed. R. Crim. P.; *Rogers v. United States*, 422 U.S. 35. However, as the court below correctly determined, defense counsel could and in effect did stipulate that the court "could permit the tapes to be replayed before the jury in counsel's absence" (Pet. App. 4a). As the court of appeals observed (*ibid.*):

[I]n part of his instructions, the judge informed the jurors that all exhibits were available for their consideration and assistance during deliberations.

³Petitioners' claim that Ault was one of the chief witnesses for the prosecution is incorrect. Ault was one of 16 government witnesses; his direct testimony covered 10 pages of an 800-page transcript and simply introduced the fact that petitioners' telephone conversations had been electronically intercepted and that their residences had been searched (Tr. 3-12).

Thus, at that time, defense counsel knew that the tapes * * * would be available to the jury, and made no objection. Furthermore, when counsel for appellants finally did object, their primary objection was directed at the presence of Agent Ault, because of his "interest in the outcome of this lawsuit." Appellants have not demonstrated to us any prejudice that resulted from the judge's failure to answer the [jury's] request in open court. * * * [U]nder these circumstances, we determine that appellants constructively stipulated to the replay of the tapes at the jury's request.

Furthermore, the procedure followed here was similar to a procedure that had been followed in petitioners' first trial,⁴ a fact that supports the court of appeals' conclusion that petitioners consented to the procedure.

2. In any event, exchanges between the court, its delegates, and the jury similar to the one in this case do not require reversal of the conviction where there is no showing of prejudice to the absent defendant. See *Rogers v. United States*, *supra*. No showing has been made here. The directions transmitted to the jury by Deputy Clerk Soucek stated merely that the jurors should not converse or take notes while the tapes were being played. There was nothing inimical to petitioners' defense in these directions or in the manner in which they were delivered. And while it might have been preferable for the court to select someone other than Ault to operate the tape recorder, Ault's role was strictly technical. He made no remarks to the jury, "was never

alone with [it] and was in its presence only long enough to replay the tapes" (Pet. App. 5a).

This is a far cry from *Turner v. Louisiana*, 379 U.S. 466. There, the two deputy sheriffs who were the principal witnesses for the prosecution were placed in charge of the jury during their sequestered deliberations and were "continuously in the company" of the jury during the three days of trial (379 U.S. at 468). The deputies "ate with them, conversed with them, and did errands for them" (*ibid.*). They had the "opportunity * * * to renew old friendships and make new acquaintances among the members of the jury" (*id.* at 473), and the defendant's fate "depended upon how much confidence the jury placed in these two witnesses" (*id.* at 474). This Court found this association to have violated the defendant's basic Fourteenth Amendment right to trial by jury. But in so holding it emphasized that the deputies' testimony "was not confined to some uncontested or merely formal aspect of the case for the prosecution" and that the deputies' contact with the jury was not a "brief encounter, but * * * a continuous and intimate association throughout" the deliberations (*id.* at 473).

As the courts below correctly concluded, quite the contrary is the case here. Ault's testimony on direct examination simply established that he was the case agent and had obtained court orders to monitor two telephones, had recorded a number of conversations, had directed the execution of search warrants on petitioners' homes, and had directed that handwriting exemplars be obtained from petitioners (Tr. 3-12). And, unlike the situation in *Turner*, Ault's subsequent contact with the jury was brief, perfunctory and impersonal.

⁴Tr. p. 6, 8, 9, 18; Tr. 359-361.

In light of these facts—as the court below found—“Ault’s presence did not affect [petitioners] ‘substantial rights’ ” (Pet. App. 5a).⁵

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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⁵Petitioners correctly note that in *United States v. Pittman*, 449 F. 2d 1284, the Ninth Circuit reversed a conviction obtained in circumstances somewhat similar to those presented here. There, however, the agent who replayed the tapes for the jury “had been prominently aligned with the Government’s case during the trial[and] had testified at length.” 449 F. 2d at 1285. That was not the case here. See note 3, *supra*; Pet. App. 6a. Moreover, there is no suggestion in *Pittman* that defense counsel acquiesced in the procedure adopted for replaying the tapes. At all events, there is no need for this Court to resolve the difference, if any, between the approach taken in *Pittman* and the result here. The issue is not one that arises with any frequency, and it is unlikely to recur in the Sixth Circuit, since the court below emphasized that, in the absence of a prior stipulation concerning contact with the jury, “in the future we will not * * * condone similar [occurrences]” (Pet. App. 6a).